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In the Supreme Court of the United States

OCTOBER TERM, 1976

ILLINOIS BRICK COMPANY, AMERICAN BRICK CO., AMPRESS BRICK CO., INC., ANJO, INC., CHICAGO BLOCK CO., INC., E. L. RAMM COMPANY, HEIGHTS BLOCK, INC., JOLIET CONCRETE PRODUCTS, INC. and NORTHFIELD BLOCK CO.,

Petitioners,

vs.

STATE OF ILLINOIS, et al.,

Respondents.

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 536 F.2d 1163. The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 67 F.R.D. 461. The opinions are printed in the Appendix to the Petition for a Writ of Certiorari at pages App. 1 and App. 10, respectively.*

* Abbreviated hereinafter as "Cert. Pet. App." Citations to the appendix to the briefs are referred to as "A."

JURISDICTION

The judgment of the Court of Appeals reversing the District Court was entered on June 22, 1976. (Cert. Pet. App. 23.) The Petition for a Writ of Certiorari was filed on September 17, 1976, and the writ was granted on November 8, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . ."

Section 4 of the Clayton Act, 15 U.S.C. §15, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

QUESTION PRESENTED

In a civil antitrust suit brought by the State of Illinois alleging price-fixing by manufacturers of concrete block, can the State of Illinois, which did not purchase concrete block but instead purchased buildings, one of whose components was concrete block, recover for the alleged overcharge paid by the first purchaser of the concrete block, on the theory that the overcharge was passed on to the State of Illinois, even though the chain of distribution of concrete block did not involve any cost-plus or similar pricing arrangements?

STATEMENT OF THE CASE

Respondent, the State of Illinois (hereinafter the "State"), on behalf of itself and various local governmental entities in the Greater Chicago area, brought this civil action charging that the defendants (Petitioners), all of whom manufacture and/or sell concrete block, violated Section 1 of the Sherman Act, 15 U.S.C. §1, by conspiring to fix the price of concrete block. (A. 6.) The State seeks to recover the alleged overcharge in the price of concrete block used in public building projects. Jurisdiction of the District Court was predicated upon Section 4 of the Clayton Act, 15 U.S.C. §15.

In 1973, the United States indicted the defendants, charging that they violated Section 1 of the Sherman Act by conspiring to fix the price of concrete block.* In the wake of the federal indictment, numerous civil treble-damage actions were filed, all alleging the same conspiracy and seeking to recover the same alleged overcharge.** These cases were instituted by masonry contractors, general contractors, and private builders, as well as the State. Several

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* *United States* v. *Ampress Brick Co.*, No. 73 CR 312, in the United States District Court for the Northern District of Illinois, Eastern Division.

** Other than the State's case, these civil cases were *Corona Construction Co.* v. *Ampress Brick Co.*, No. 73 C 1082; *Home Builders of America, Inc.* v. *Ampress Brick Co.*, No. 73 C 1278; *Mor-well General Contractors, Inc.* v. *Ampress Brick Co.*, No. 73 C 1458; *Normandy Hill, Inc.* v. *Ampress Brick Co.*, No. 74 C 652; and *Raspanti Masonry* v. *Ampress Brick Co.*, No. 74 C 769. The federal government also brought a civil case: *United States* v. *Ampress Brick Co.*, No. 73 C 1016. All of these suits were brought in the United States District Court for the Northern District of Illinois, Eastern Division.

of the cases were class actions, and all actions except the State's were settled.* (A. 204.)

In the State's case, defendants propounded interrogatories to the plaintiffs seeking detailed information about their purported purchases of concrete block. Of the more than 700 governmental entities which the State sought to represent (A. 16-48), only 253 responded to the interrogatories.** The answers of these 253 plaintiffs revealed the following facts. Only four plaintiffs actually purchased concrete block. * * * (A. 67-68, 77.) The remaining 249 plaintiffs did not buy concrete block, but rather bought buildings, a package of goods and services of which concrete block was merely one component part. (A. 67-76.) Moreover, the concrete block did not reach the public en-

* When settlement of the other cases was proposed, the State objected even though it was not included in any settling class and thus would not be bound by any order approving the settlement. Defendants assured the District Court that settlement of the other cases would not release the State's purported claim. However, defendants also informed the District Court that they would persist in their position that the State had not suffered damages cognizable under the antitrust laws. (A. 57, 62.)

** The answers to the interrogatories were in the form of answers to a questionnaire sent out by plaintiffs' counsel. (All of the questionnaire answers were filed with the District Court and are in the record.) Samples of the answers are found in the Appendix at pages 211-90. For the plaintiffs who did not respond to the questionnaire, the State's counsel sought to provide answers by his own affidavit referring to newspaper summaries of construction news. (A. 78-201.)

*** The claims of these four direct purchasers of block are not at issue here, since defendant's summary judgment motion, which was granted, was only directed at the indirect purchaser plaintiffs. (A. 4.)

tities through pre-existing cost-plus contracts or any similar pricing arrangement. Instead, the building projects were awarded pursuant to state statutes mandating competitive bidding.* (See Questionnaire Answer I.C.)

The concrete block manufactured by defendants is sold to masonry contractors. The masonry contractors submit bids to general contractors not just for concrete block, but for all of the goods and services that comprise the masonry portions of the building projects. The general contractor in turn collects all sub-bids for goods and services and compiles a bid for a particular building project in competition with other general contractors. (See Questionnaire Answers I.C. and I.E.; A. 9-10.) Thus, before any of defendants' concrete block reached the public building projects, it passed through at least two separate, unrestrained levels in the chain of distribution—the masonry contractors and the general contractors—where complex and independent pricing decisions were made.** No allegation

* State of Illinois statutes mandate competitive bidding subject to certain limited exceptions, e.g., contracts for small dollar amounts. See, Ill. Rev. Stat. ch. 127, §132.6 (state agencies); Ill. Rev. Stat. ch. 122, §10-20.21 and §35-10 (school districts); Ill. Rev. Stat. ch. 24, §8-9-1 and §8-10-13 (municipalities); Ill. Rev. Stat. ch. 34, §5028 (county hospitals); and Ill. Rev. Stat. ch. 34, §1006 (counties).

** The complexity of the bidding process and the inadequacy of plaintiffs' proof is demonstrated by the fact that less than seven percent of the plaintiffs could state the cost of the concrete block incorporated into their building projects. Only forty-eight of the more than seven hundred plaintiffs were able to report the cost of the concrete block. Twenty of these entities reported the cost on only some projects, and seven others appeared to be estimating the cost. (See Questionnaire Answers I. A. and B.) The Chicago public school system which had 60 building projects was unable to state the cost of the concrete block or the name of the masonry contractor on even one project. (A. 217-34.)

has been made and no proof has been offered that the defendants controlled the two intervening levels in the chain.

Relying upon plaintiffs' answers to the interrogatories, the defendants moved for summary judgment against all plaintiffs who bought buildings and thus were indirect purchasers of concrete block. The ground for the motion was that, under this Court's opinion in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), these plaintiffs were unable to recover for any alleged pass-on of the alleged overcharge in the price of concrete block since they did not fit the narrow cost-plus exception of *Hanover*. Plaintiffs did not submit by affidavit, deposition testimony or interrogatory answers any contradictory or explanatory facts in opposition to the summary judgment motion. Indeed, counsel for the State was willing to stand on the factual record created by the plaintiffs' interrogatory answers and indicated to the District Court that the motion was ripe for decision. (A. 203, 209-10.)

The District Court classified these plaintiffs as ultimate consumers, i.e., those who obtain a finished product from a middleman in the chain of distribution who altered or added to the goods received from the manufacturer. The District Court held that the ultimate consumer's injury, if any, was too remote and granted summary judgment. Treating the issue merely as one of standing, the Court of Appeals reversed.

SUMMARY OF ARGUMENT

The Seventh Circuit erred when it reversed the District Court's summary judgment against all plaintiffs who were not purchasers of concrete block, but were purchasers of buildings containing block. The block did not pass through a chain of distribution pursuant to any pre-existing cost-plus contracts or other similar pricing arrangements. Instead, it passed through two unrestrained levels of distribution where independent pricing decisions were made in a competitive bidding process.

The Seventh Circuit's decision is at odds with this Court's decision in *Hanover,* where this Court concluded that, absent a pre-existing cost-plus contract or similar pricing arrangement, the first purchaser of a product can recover for an overcharge in the price of a product, regardless of any pass-on. Since defendants cannot even assert the pass-on defense against the first purchaser, necessarily the indirect purchasers cannot recover for the same overcharge, or defendants will be subjected to multiple recoveries (trebled), a totally unwarranted result.

In the face of this problem, there are two choices: either overrule *Hanover* and allow all purchasers in the chain of distribution to maintain competing claims for the same overcharge, or continue to apply *Hanover* and preclude recoveries by indirect purchasers. The latter choice is the only tenable one. The result in *Hanover* was premised largely upon the fact that proof of a pass-on involves "insurmountable" evidentiary problems. Since proof of a pass-on is inherently impossible, the issue should not be interjected into antitrust cases. Otherwise, these suits will be needlessly complicated, diverting resources of the federal judiciary into what is ultimately a futile task.

ARGUMENT

I.

UNDER HANOVER, ONLY DIRECT PURCHASERS OF A PRICE-FIXED PRODUCT CAN PROVE AND RECOVER DAMAGES, ABSENT A PRE-EXISTING COST-PLUS CONTRACT.

A civil antitrust claim is not established merely by proving that an antitrust violation has occurred. There must also be proof that the violation injured the claimant, as well as what damage it caused. In situations in which an unlawful overcharge has been made for a product which goes through a chain of distribution from the manufacturer to the ultimate consumer, the question has arisen of which persons in the chain are able to prove that they have actually suffered legally cognizable injury and have been damaged by the overcharge. In other words, the issue is whether tracing the pass-on of the overcharge through the chain is inherently impossible because the evidentiary problems are legally insurmountable.

The controlling decision on the pass-on issue is *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), in which this Court squarely faced the issue, concluded that the difficulties in proving a pass-on were inherently insuperable, and effectively ruled that, subject to the cost-plus exception discussed below, only the first or direct purchaser could recover the full overcharge (trebled), *regardless* of any purported passing on of that overcharge to others in the chain of distribution, *i.e.*, the indirect purchasers.

In *Hanover*, a monopolist was charged with exacting an illegally high price for its product, shoe manufacturing machinery. The suit was brought by a lessee of the machinery who asserted, and the trial court so found, that, if the monopolist had sold the machinery instead of leasing it, the cost would have been lower. The monopolist contended and offered evidence that the lessee, by increasing the price of the shoes which it made with the machinery, had passed on the overcharge to its customers and thus had suffered no injury. The trial court rejected the defense and refused even to consider the evidence of the pass-on, deeming it to be irrelevant. This Court agreed.

This Court not only rejected the pass-on defense, but adopted principles of broad applicability.

> "We think it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of §4.
>
> "... *We hold that the buyer is equally entitled to damages if he raised the price for his own product.* As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows." (Emphasis added.) 392 U.S. at 489.

In holding that the first purchaser of a price-fixed product is the proper party to recover for the overcharge, the Supreme Court explicitly reaffirmed its prior holdings in *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U.S. 390 (1906); *Thomsen* v. *Cayser*, 243 U.S. 66 (1917); *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918); and *Adams* v. *Mills*, 286 U.S. 397 (1932) (392 U.S. at 489-90), and quoted approvingly from its opinion in *Southern Pacific:*

> "*The general tendency of the law, in regard to damages at least, is not to go beyond the first step.* . . . The carrier ought not to be allowed to retain his illegal profit and the *only one* who can take it from him is the one that alone was in relation with him and from whom the carrier took the sum." (Emphasis added.) 392 U.S. at 490-91, n. 8.*

In rejecting the pass-on defense, this Court stressed the virtual impossibility of proving the pass-on to others in the chain of distribution, whereas proof that the first purchaser is injured by the overcharge is relatively easy and certain. It is quite clear that the first purchaser pays the overcharge, and consequently suffers economic injury. Absent the overcharge, the initial purchaser would have made more profit upon resale.

> "If in the face of the overcharge the buyer does nothing and absorbs the loss, he is entitled to treble damages. This much seems conceded. The reason is that he has paid more than he should and his property has been illegally diminished, for had the price paid been lower his profits would have been higher. It is also clear that if the buyer, responding to the illegal price, maintains his own price but takes steps to increase his volume or to decrease other costs, his right to damages is not destroyed. Though he may manage to maintain his profit level, he would have made more if his purchases from the defendant had cost him less. We hold that the buyer is equally entitled to damages if he raises the price for his own product. . . . At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower." 392 U.S. at 489.

* This Court later reaffirmed its holding in *Hanover. Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972).

In contrast with the situation of the first purchaser, this Court realized that the proof of a pass-on to an indirect purchaser normally presents inherently insoluble evidentiary difficulties. This is so because the indirect purchaser buys the product in an unrestrained market. It is not possible with any degree of certainty to reconstruct either the factors which affect the pricing decision, or the decision itself.

> "A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, conditions more buoyant, or the general economic labor market tighter, for example) he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. *Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable.*" (Emphasis added.) 392 U.S. at 492-93.

Analysis of the opinion in *Hanover* demonstrates that the inability to prove a pass-on exists as a matter of law. The Court considered what must be the best possible case of proof of a pass-on—*i.e.*, that the first purchaser raised

his resale price for the product in the exact amount of the overcharge—and concluded that such a showing was insufficient. Necessarily, showing that a price increase was some amount not equal to the overcharge will be even more unsatisfactory.

The Court recognized a limited exception to its ruling that the defendant could not raise the pass-on defense against the first purchaser, and that was where the purchaser resold the product pursuant to a "pre-existing 'cost-plus' contract" or very similar pricing arrangement. Such an exception is reasonable. In a cost-plus situation, an overcharge could be traced since the resale price is derived by an arithmetical computation unaffected by fluctuating market conditions and subjective pricing decisions of independent businessmen. Consequently, the factors which usually make it impossible to prove a pass-on are not present, and proof that the first purchaser was not damaged would be feasible. 392 U.S. at 494.

While the *Hanover* case posed the issue in terms of rejecting the assertion of the pass-on defense rather than denying a claim by an indirect purchaser, the result is the same. If the proof of a pass-on is virtually impossible for a defendant, it is equally impossible for an indirect purchaser. The factors which account for the intrinsic inability to establish a pass-on do not change. Consequently, *Hanover* draws a line which when applied determines that, absent pre-existing cost-plus contracts or similar pricing arrangements, indirect purchasers cannot sue and recover for overcharges; only the first purchaser can.

This logical result was recognized by the Third Circuit in *Mangano* v. *American Radiator & Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971), *affirming, Philadelphia Housing Authority* v. *American Radiator & Standard Sani-*

tary Corp., 50 F.R.D. 13 (E.D. Pa. 1970). *Accord, Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 323 F.Supp. 381 (E.D. Pa. 1970). In *Mangano*, the plaintiffs (indirect purchasers) raised the pass-on issue, charging that illegal overcharges by manufacturers of plumbing fixtures had been passed on to them increasing the cost of the buildings which plaintiffs purchased. Since plaintiffs did not fit the cost-plus exception to *Hanover*, judgment was entered against them.*

II.

THE SEVENTH CIRCUIT AND OTHER COURTS HAVE FAILED TO FOLLOW THE DICTATES OF HANOVER AND HAVE ERRONEOUSLY ALLOWED INDIRECT PURCHASERS TO MAINTAIN CLAIMS FOR ALLEGED PASS-ONS.

In the case at bar, the plaintiffs are clearly not first or direct purchasers of concrete block. Instead, they are indirect purchasers and then only to the extent that concrete block is a component of the buildings which they bought. It is also clear that the pricing mechanisms through which the concrete block passed into the buildings did not involve pre-existing cost-plus contracts or similar pricing

* Other decisions in accord with the view that indirect purchasers cannot raise the pass-on issue include: *Denver* v. *American Oil Co.*, 53 F.R.D. 620 (D. Colo. 1971); *United Egg Producers* v. *Bauer International Corp.*, 312 F.Supp. 319 (S.D.N.Y. 1970); *Donson Stores, Inc.* v. *American Bakeries Co.*, 58 F.R.D. 481 (S.D.N.Y. 1973); *Akron* v. *Laub Baking Co.*, 1972 Trade Cas. ¶73,930 (N.D. Ohio 1972); *Stern* v. *Lucy Webb Hayes Nat'l Training School*, 367 F.Supp 536 (D.D.C. 1973); *Travis* v. *Fairmont Foods Co.*, 346 F.Supp. 679 (E.D. Pa. 1972); *Minielli Cement Contracting, Inc.* v. *Richter Concrete Corp.*, 62 F.R.D. 381 (S.D. Ohio 1973).

arrangements. In answers to interrogatories, plaintiffs uniformly stated that their building projects were not awarded on a cost-plus contract basis. Instead, they were awarded pursuant to competitive bids submitted by general contractors, who in turn received bids from masonry contractors. Thus, the concrete block passed through two independent, untainted levels of pricing—the masonry contractors and the general contractors.

In just such a situation, the court in *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 323 F.Supp. 381 (E.D. Pa. 1970), applying *Hanover* and the Third Circuit rule, dismissed the claims of public entities suing for overcharges on plumbing fixtures incorporated into public buildings.

> "The public bodies here entered into contracts for their finished structures as a result of sealed bids submitted by general contractors and not as a result of negotiated prices. The requirement that competitive bids be submitted necessarily demands that the contractor bear the full risk if prices are inaccurately estimated. Such an arrangement is distinctly different from the cost-plus type of a contract which might permit the tracing to an end user of the increased prices paid for the fixtures in question. The facts here then do not fall within the exception noted by Mr. Justice White in *Hanover* (392 U.S. at 404). . . ." 323 F.Supp. at 385.

The pricing mechanism here is the same as in *Philadelphia Housing Authority*. The facts are undisputed, and the plaintiffs offered no evidence to show that somehow the concrete block goes through a cost-plus type of mark-up on its way into the public buildings.* Despite this record, the

* One purpose of the summary judgment motion was to force plaintiffs to submit some evidence, if they had any, that they fit the cost-plus exception in *Hanover*. Having failed to do that, summary judgment was proper.

Seventh Circuit reversed the District Court's grant of summary judgment and held that these indirect purchasers could sue and recover for the alleged overcharge. That decision is contrary to the policy set forth in *Hanover* and was error.

The Seventh Circuit is not the only court which has refused to apply *Hanover* properly.* These courts offer various rationales to avoid following *Hanover*. For instance, the Seventh Circuit in this case ignored the undisputed factual record before the District Court, and mistakenly labeled the issue as one of standing.** (Cert. Pet. App. 8.) The issue here and in *Hanover*, however, is not standing, but rather proof of injury and monetary damage. The decision in *Hanover* was based upon the insuperable evidentiary problems involved in proving a pass-on. This Court concluded in *Hanover* that only evidence of pricing pursuant to a pre-existing cost-plus contract or other similar arrangement could satisfactorily prove a pass-on with rea-

* See *e.g.*, *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied sub nom.*, *Standard Oil Co.* v. *Alaska*, 415 U.S. 919 (1974); *Boshes* v. *General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill. 1973); *In re Master Key Antitrust Litigation*, 1973-2 Trade Cas. ¶74,680 (D. Conn. 1973); *Carnivale Bag Co.* v. *Slide-Rite Mfg. Corp.*, 395 F.Supp. 287 (S.D.N.Y. 1975); *Lefrak* v. *Arabian American Oil Co.*, 1975-2 Trade Cas. ¶60,621 (E.D.N.Y. 1975).

** Other cases which label the issue as standing to get around *Hanover* are *Western Liquid Asphalt*, *Master Key*, *Carnivale Bag* and *Boshes*, *supra*. The court in *Western Liquid Asphalt* sidestepped the evidentiary issue by *assuming* that the plaintiffs could prove a pass-on (487 F.2d at 197 n.5), an assumption which is totally unjustifiable in light of *Hanover*, since the uncertainty and difficulty of such a task is precisely what led this Court to reject the attempt to do so.

sonable certainty and that anything less than that would be legally insufficient. The Court did not say that, all things considered, the defendant's evidence of a pass-on was unpersuasive, but instead stated that defendant was not even entitled to submit the evidence. 392 U.S. at 494. If defendants cannot be heard on this matter, neither can plaintiffs. Thus, courts like the Seventh Circuit which treat the issue as one of standing are merely postponing the ultimate confrontation with the hard evidentiary problems.*

Another excuse used by the courts to justify letting indirect purchasers sue is that such suits help to enforce the antitrust laws and ensure that defendants have to disgorge their ill-gotten gains. The former point is contrary to this Court's conclusion in *Hanover* that, upon balancing all relevant interests, vigorous enforcement of the antitrust laws is accomplished by allowing the first purchasers to sue and recover all of the overcharge without getting bogged down in the pass-on issue. 392 U.S. at 494. As to the latter point, in *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook Ry.*, 417 U.S. 703, 717 (1974) (a securities case), this Court rejected just such an argument.

> "*If deterrence were the only objective, then in logic any plaintiff willing to file a complaint would suffice.* No injury or violation of a legal duty to the particular plaintiff would have to be alleged. The only prerequisite would be that the plaintiff agree to accept the recovery, lest the supposed wrongdoer be allowed to escape a reckoning. *Suffice it to say that we have been referred to no authority which would support so novel a result, and we decline to adopt it.*" 417 U.S. at 717. (Footnote omitted; emphasis added.)

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* Handler and Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and a Suggested New Approach*, 85 Yale L. J. 626, 643 (1976).

See also, *Hawaii* v. *Standard Oil Co.*, 405 U.S. 259, 262-64 (1972).

In the final analysis, when the decisions allowing indirect purchasers to sue for alleged pass-ons are weighed against the dictates of *Hanover*, it is obvious that they are not legitimate exceptions to *Hanover* and thus are erroneous.

III.

ALLOWING INDIRECT PURCHASERS TO RECOVER FOR ALLEGED OVERCHARGES CREATES THE SERIOUS PROBLEM OF MULTIPLE RECOVERIES.

One of the most serious and unwarranted consequences of the decisions which allow indirect purchasers to sue and recover for alleged overcharges is that they subject defendants to multiple recoveries (trebled) for the same alleged overcharge. This fact was explicitly recognized by the court in *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13 (E.D. Pa. 1970), and was one of the reasons for holding that the indirect purchasers there had no claim.

While everyone seems to concede that multiple recoveries for the same alleged overcharge is an unacceptable result,* no court which allows indirect purchasers to trace the pass-on has satisfactorily explained how it can be avoided.

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* *E.g.*, *Illinois* v. *Ampress Brick Co.*, Cert. Pet. App. 8; *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 198 (9th Cir. 1973); *Boshes* v. *General Motors Corp.*, 59 F.R.D. 589, 596 (N.D. Ill. 1973); *In re Master Key Antitrust Litigation*, 1973-2 Trade Cas. ¶74,680 at p. 94,979 (D. Conn. 1973). *Cf. Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 264 (1972).

Some courts have suggested that doctrines such as the statute of limitations and collateral estoppel would minimize the potential for duplicative recoveries. See *Boshes* v. *General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill. 1973); *In re Master Key Antitrust Litigation*, 1973-2 Trade Cas. ¶74,680 (D. Conn. 1973). The statute of limitations, of course, will bar duplicative recoveries only if someone in the chain of distribution fortuitously happens to delay in filing a claim. Frequently, as in this case, people from all levels of the chain file competing claims for the same overcharge. For collateral estoppel to be effective, the party to be estopped must have had a full and fair opportunity to litigate the factual question at issue. *Blonder-Tongue Laboratories, Inc.* v. *Univ. of Illinois Foundation*, 402 U.S. 313 (1971); 1B *Moore, Federal Practice* ¶0.411-.412, 0.441[3] (2d ed. 1974). Thus, indirect purchasers at one level in the chain are not estopped from contending that an overcharge was passed on to them even if someone at another level in the chain has already recovered for the same overcharge. Nor could the first purchaser be estopped by the fact that indirect purchasers have collected for an alleged pass-on.*

The Seventh Circuit acknowledged that under its opinion in this case both immediate purchasers and subsequent purchasers could recover damages from the defendants. The Court stated, however, that "according standing to ultimate purchasers need not result in double recovery because appropriate means can be found to apportion any damages that might be assessed." (Cert. Pet. App. 8.) The Court did not discuss what these appropriate means might be. Moreover, since *Hanover* denies defendants even the

*The court in *Carnivale Bag* realized that collateral estoppel offered no protection against multiple recoveries. 395 F.Supp. at 292 n. 8.

opportunity to defend against the first purchaser by asserting a pass-on and thereby allows the first purchaser to recover the full amount of any overcharge, it is difficult to perceive what is left to apportion. The Seventh Circuit's basic, unstated premise—that the first purchaser is not entitled to recover the full overcharge—is flatly at odds with *Hanover*, since reducing or eliminating the recovery of the first purchaser means recognizing pass-on as a total or partial defense. Thus, the Seventh Circuit has attempted to overrule *Hanover*.

Putting aside the issue of whether subjecting defendants to multiple recoveries (trebled) for the same overcharge violates due process,* such a result is patently unfair to the defendants. Either *Hanover* should be applied to preclude suits by indirect purchasers for the overcharge, or *Hanover* should be abrogated so that defendants may raise the defense of a pass-on against the first purchaser and others in the chain of distribution.

IV.

THIS COURT SHOULD CONTINUE TO APPLY THE POLICY AND RESULT OF HANOVER.

It is imperative that this Court set forth the policy which is to govern this important issue of antitrust law and resolve the pass-on matter once and for all. The multiple recovery problem makes the present situation untenable. Defendants should not be precluded from defending against the first purchaser while at the same time being subject to suit by indirect purchasers. Realistically, there are two choices: either *Hanover* should be overruled, all indirect purchasers should be allowed to prove allegedly

* See *Western Union Co.* v. *Pennsylvania*, 368 U.S. 71 (1961).

passed-on overcharges, and defendants should be able to defend against everyone including the first purchaser on the basis of a pass-on; or the rule in *Hanover* should continue to stand, which (subject to the cost-plus exception) would allow the first purchaser to recover the full overcharge, deprive defendants of the pass-on defense, and preclude recovery by indirect purchasers. Petitioners submit that the better choice is the latter one—continued application of *Hanover.**

This Court decided *Hanover* based upon the very real and exceedingly difficult, indeed "insurmountable," evidentiary problems involved in proving a pass-on. The Court noted that proof of facts in the real economic world, rather than theoretical economic principles, is necessary to establish injury and damage. A host of factors determine or have an effect upon pricing decisions, and after the fact, it is virtually impossible to reconstruct what a given price would have been had any one factor been different. The Court stated that a pass-on would not be proved even if "the buyer raised his price in response to, and in the amount of, the overcharge. . . ." 392 U.S. at 493.

> "The mere fact that a price rise followed an unlawful cost increase does not show that the sufferer of the cost increase was undamaged. His customers may have been ripe for his price rise. . . ." 392 U.S. at 493 n. 9.

The instant case presents a factual situation that is not even as good as the one just discussed which the Court rejected in *Hanover.* Here there is no evidence that the masonry contractors raised their prices in the exact amount of the alleged overcharge or that the general contractors then did the same. The fluctuating factors affecting con-

* See generally discussion in *Handler* and *Blechman, supra,* 85 Yale L. J. at 638-49.

struction costs, as well as the mental processes of the contractors in deciding prices, would have to be explored and proved to a jury, not just once but for each contractor in the chain of distribution and for each building project. There are over 700 plaintiffs in this case. If each plaintiff had only two to three projects, that is 1400 to 2100 separate cases. If proving just one pass-on is inherently impossible, a trial at which 1400 or more pass-ons are at issue would quickly become an insoluble morass.*

The common fault of those lower courts which, since *Hanover,* have considered that indirect purchasers could prove injury and damage absent a cost-plus situation is that they ignore the evidentiary problems that loomed so large in this Court's analysis in *Hanover.*** But if, as this Court said in *Hanover* (392 U.S. at 493), the problems of proving that an overcharge was passed on are normally insuperable for the defendant, they are equally prodigious for the remote plaintiffs in the chain of distribution. Not one of these courts has come to grips with the proof problems and found that this Court was wrong, *i.e.*, that the

* The extreme difficulties of proving a pass-on are further illustrated in those situations where the concrete block is an insignificant part of the building project. For example, consider the Lake County Nursing Home project. (A. 235.) The total cost was $4,936,450; the masonry contract was $594,540; and the concrete block was $23,566. Thus, the block was only 3.9% of the cost of the masonry contract and a mere 0.47% of the cost of the total project. It is hard to believe that an alleged overcharge for an item which was less than 1% of the project cost affected the cost of the project. *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.,* 50 F.R.D. 13, 26 (E.D. Pa. 1970).

** See *e.g., Western Liquid Asphalt* where the court "assumed" that indirect purchasers could prove injury and damage. 487 F.2d at 197 n. 5.

proof problems were not insurmountable. Instead, they have forced the parties to continue costly litigation which in the end will have been for naught since the evidentiary problems will still be there and these indirect purchasers will not be able to meet their burden of proof.

Antitrust litigation is well known for being complex, protracted and expensive, both for the litigants and the federal courts. It will become even more so if the pass-on issue is interjected into these suits because that "would often require additional long and complicated proceedings involving massive evidence and complicated theories." 392 U.S. at 493. Enormous amounts of judicial energy would be consumed in any attempt to ascertain where each portion of an alleged overcharge came to rest in a distribution chain. As early as 1918, this Court commented on "the endlessness and futility of the effort to follow every transaction to its ultimate result." *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 534 (1918). As the instant case—involving the claims of remote purchasers of buildings rather than concrete block, the product allegedly subject to price fixing—graphically illustrates, tracing an overcharge "might be an accountants' paradise, but it would be a court's purgatory." *Denver* v. *American Oil Co.*, 53 F.R.D. 620, 637 (D. Colo. 1971). Any urge to determine the complete economic consequences of an alleged overcharge must be balanced against the monumental undertaking which would be required and the inevitable uncertainty of the results.

This Court clearly indicated in *Hanover* that it did not want the federal judiciary expending its precious and limited resources on such a futile task. Petitioners submit that this Court struck the proper balance in *Hanover* in allowing the first purchaser to recover the full amount of any overcharge, and only allowing indirect purchasers to

recover if they fit the cost-plus exception.* That result harmonizes the dual public interests of enforcing the antitrust laws and rationally using our judicial resources.

CONCLUSION

For all of the foregoing reasons, petitioners request that this Court reverse the Seventh Circuit's judgment and hold that summary judgment was proper against the plaintiff-indirect purchasers.

Respectfully submitted,

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* This Court and lower courts have concluded "that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n. 14 (1972).

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